

**DOCKET NUMBER 27**

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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY DEPUTY

5 Attorneys for Alleged Debtor Francis Lopez

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 8 **UNITED STATES BANKRUPTCY COURT**  
 9 **SOUTHERN DISTRICT OF CALIFORNIA**  
 10 **SAN DIEGO DIVISION**

11  
 12 In Re:

13 FRANCIS J. LOPEZ,  
 14 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

15 **MOTION BY ALLEGED DEBTOR**  
 16 **FOR AN ORDER BIFURCATING**  
 17 **TRIAL RE INVOLUNTARY**  
 18 **PETITION; SETTING A DEADLINE**  
 19 **TO ADD NEW PETITIONING**  
 20 **CREDITORS; AND REQUIRING THE**  
 21 **POSTING OF A BOND;**  
 22 **DECLARATION OF FRANCIS J.**  
 23 **LOPEZ**

24 Date: December 19, 2005  
 25 Time: 10:00 a.m.  
 26 Ctrm: 4

27 TO THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY  
 28 JUDGE, TO PETITIONING CREDITOR ALAN STANLY AND ALL INTERESTED  
 PARTIES:

## I.

**STATEMENT OF FACTS**

Francis J. Lopez and the single petitioning creditor Alan Stanly have been involved in significant litigation against each other since before the bankruptcy filing of their entity Prism Advanced Technologies, Inc. ("Prism"). This litigation has been bitterly fought for the past two years and is now pending in Superior Court between the parties, namely Lopez v Stanly, Case No. GIN029692, filed on May 14, 2003, San Diego Superior Court, North County. In that matter, Mr. Lopez has alleged numerous causes of action against Mr. Stanly including invasion of privacy, breach of fiduciary duty, trespass and identity theft. Mr. Stanly filed a cross-complaint, of course. Recently, in a second case, Mr. Stanly was successful in obtaining a judgment against Mr. Lopez for approximately \$50,000 relating to a guarantee both had made to Union Bank of a Prism loan. Recently, in a third case, Mr. Stanly has sued Mrs. Lopez claiming that she "removed property" causing \$2,000 in storage costs. It requests \$2,000 in damages and "compensatory" and punitive damages of "more than \$10,000 up to \$25,000." Mrs. Lopez has had to retain counsel to defend herself.

This involuntary chapter 7 petition is simply an extension of the litigation and a new strategy by Mr. Stanly to cause as much business and personal pain to Mr. Lopez as possible. On August 11, 2005, Mr. Lopez learned that two of his credit cards have been cancelled because the issuer thinks that he filed this bankruptcy himself. The long term costs in terms of increased interest on loans are obvious.

In any event, Mr. Lopez has well more than 12 creditors as Mr. Stanly knows very well. He knows this very well because he conducted a debtor's examination on Mr. Lopez in Florida on May 9, 2005. The examination transcript covers 65 pages of testimony by Mr. Lopez. Mr. Lopez was asked at length about his creditors and the numbers and total amount owed. Despite Mr. Stanly's personal participation in the examination by

1 telephone, he nevertheless stated in his declaration in this case that he was only aware that  
2 the alleged debtor had three creditors, which he claimed were all in California.

3 This Involuntary Petition was filed June 30, 2005 with Mr. Stanly as the only  
4 petitioning creditor. The Answer specifically identified 22 creditors. That list is attached  
5 hereto as Exhibit A. On or about October 3, 2005, Mr. Stanly served 12 of the creditors  
6 with a subpoena seeking documents on November 1, 2005. At the Status Conference on  
7 October 12, 2005, Stanly's counsel advised the court that discovery was sitting on his desk  
8 to be served that week. As of November 16, 2005, no such discovery has been served and  
9 in fact nothing at all has taken place.

10 No new creditors have joined as petitioning creditors. Therefore this case will be  
11 dismissed at trial which should be held at the earliest possible time.

## 12 II.

### 13 **TRIAL SHOULD BE BIFURCATED SO THAT THE ISSUE OF** 14 **NUMBER OF CREDITORS MAY BE DETERMINED QUICKLY AND A** 15 **DEADLINE SHOULD BE SET FOR ADDING ADDITIONAL** 16 **PETITIONING CREDITORS**

17 An Involuntary Chapter 7 case exists pursuant to Section 303 of the bankruptcy  
18 code which requires that two factors be met, namely, that there be three petitioning  
19 creditors, and that the debtor be found to be "generally no paying his debts as they become  
20 due." An exception exists that if the debtor has fewer than 12 creditors, only one  
21 petitioning creditor is required. The alleged debtor has identified his creditors in the  
22 Answer. There are 22 and therefore this case must be dismissed.

23 Mr. Stanly's counsel correctly pointed out at the Status Conference that certain  
24 creditors are not included in the computation of the total. Section 303(b)(1) requires the  
25 creditor to be "such person that is not contingent as to liability or the subject of a bona fide  
26 dispute as to liability or amount . . ." and Section 303(b) excludes "any employee or  
27 insider of such person and any transferee of a transfer that is voidable under section 544,  
28

1 545, 547, 548, 549, or 724(a) of this title.” Since he has not been able to find two other  
 2 persons to join him in this jaunt, he is presumably attempting to determine if he can  
 3 eliminate nearly half of Mr. Lopez’s creditors so that he can be the sole petitioning  
 4 creditor.

5 The requirement that, in the presence of 12 or more creditors, at least 3 must  
 6 petition before an order for relief issues is not jurisdictional, but is an absolute defense to  
 7 the issuance of an order for relief. *In Re Kidwell*, 158 B.R. 203 (Bkrtcy E.D. Cal. 1993).  
 8 If no more petitioning creditors join this case, it is Stanly’s burden to prove that the  
 9 alleged debtor has less than 12 creditors. *In Re Smith*, 243 B.R. 169, 183 (Bkrtcy. N.D.Ga.  
 10 1999).

11 All creditors are to be counted, no matter how small. The court may *not* exclude  
 12 small, recurring or de minimus creditors. *Hornblower & Weeks-Hemphill Noyes v.*  
 13 *Okamoto*, 491 F.2d 496 (9<sup>th</sup> Cir. 1974).<sup>1</sup>

14 The alleged debtor requests that this court bifurcate the trial and require Mr. Stanly  
 15 to put on testimony and documentary evidence *immediately* establishing that he has met  
 16 the requirement of Section 303(b)(1). This does not require further discovery. This will  
 17 not require significant court time because the issues are easy. Mr. Lopez is ready for trial  
 18 on this issue at any time. In fact, it is unlikely that his testimony will be required at trial.  
 19 Per his declaration attached, his 22 creditors are not contingent, or subject of a bona fide  
 20 dispute (except Mr. Stanly whose judgment is being appealed). None of the 22 are  
 21 employees or insiders. None of these creditors received a payment which was outside of  
 22 the ordinary course of business.

23 As to the second issue of whether or not Mr. Lopez is “generally paying his debts as  
 24 they become due,” the trial is likely to be lengthy. Significantly more evidence will be  
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26  
 27 <sup>1</sup> There is a split of authority on this issue in the circuits. For a discussion on the  
 28 split, the policy reasons behind both sides of that argument see *Matter of Rassi* (7<sup>th</sup> Cir.  
 1983) 701 F.2d 627, where the court decided to follow the Ninth Circuit, which appears to  
 be the majority rule.

1 required and therefore if the case can be dismissed without getting to that issue, justice will  
2 be served.

3 In addition, Mr. Stanly should be required to find additional petitioning creditors by  
4 a date certain. This case has been pending for more than four months now and Mr. Stanly  
5 had knowledge long ago that Mr. Lopez had more than 12 creditors. To allow him an  
6 unlimited amount of time to add petitioning creditors only adds to the unfair burden  
7 already placed on the alleged debtor. Mr. Lopez requests that the deadline be set for 10  
8 days prior to the time set for trial in this matter.

### 10 III.

#### 11 **THE COURT SHOULD REQUIRE A BOND PURSUANT** 12 **TO SECTION 303(e)**

13 11 USC Section 303(e) provides:

14 “(e) After notice and a hearing, and for cause, the court may require the petitioners  
15 under this section to file a bond to indemnify the debtor for such amounts as the court may  
16 later allow under subsection (i) of this section.”

17 The court is requested to require the posting of a bond by Mr. Stanly in an amount  
18 deemed reasonable to the court but at least \$20,000 as the alleged debtor intends to seek  
19 his costs, attorney’s fees and damages once this case is dismissed. The filing of the  
20 petition has caused considerable damage to the alleged debtor as certain creditors believe  
21 that he filed the case himself and have refused to

22 11 USC Section 303(i) provides:

23 (i) If the court dismisses a petition under this section other than on consent of all  
24 petitioners and the debtor, and if the debtor does not waive the right to judgment under this  
25 subsection, the court may grant judgment—

26 (1) against the petitioners and in favor of the debtor for—

27 (A) costs; or

28 (B) a reasonable attorney’s fee; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

*In Matter of Dill*, 13 B.R. 9, (Bkrtcy.D.Nev 1991) the court looked at the good faith of the petitioning creditors who “appeared to be men of some substantial means who seemed to have filed in good faith” when denying the bond requirement. Also in that case, the property of the estate was a building which was not declining in value and therefore the alleged debtor was deemed not to be in risk. See also, *In re Reed*, 11 B.R. 755 (Bkrtcy S.D.W.Va.1981) Here an order granting fees, costs and damages against Mr. Stanly is likely to be very difficult to collect.

The legislative analysis of this code section states: “The bonding requirement will discourage frivolous petitions as well as spiteful petitions based on a desire to embarrass the debtor (who may be a competitor of a petitioning creditor) or to put the debtor out of business without good cause. An involuntary petition may put a debtor out of business even if it is without foundation and is later dismissed.” Mr. Lopez is at great risk here which is obviously the goal. A significant bond should be required.

#### IV.

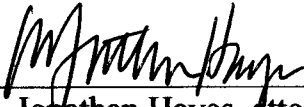
#### CONCLUSION

The alleged debtor asks this court to bifurcate the trial so that the issue of number of creditors is tried first, set the trial on that issue at the earliest possible time and require the posting of a bond.

Respectfully submitted,


LAW OFFICES OF M. JONATHAN HAYES

Dated: 11/18/05

By:   
M. Jonathan Hayes, attorney for Francis J. Lopez

1  
2  
3 Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011  
4 that the relief provided by the order is the relief granted by the court.

5 Submitted by:

6  
7 By:   
8 M. Jonathan Hayes  
9 Attorney for Francis J. Lopez



**DECLARATION OF FRANCIS J. LOPEZ**

I, Francis J. Lopez, declare as follows:

1. I am the alleged debtor in this matter. The statements made herein are of my own personal knowledge and if called upon to testify, I could and would competently testify thereto.

2. Alan Stanly and I have been involved in significant litigation against each other since before the bankruptcy filing of our entity Prism. In fact, litigation is pending right now in Superior Court between us, namely Lopez v Stanly, Case No. GIN029692, filed on May 14, 2003, pending in San Diego Superior Court, North County. In that matter, I sued Mr. Stanly for numerous causes of action, including invasion of privacy, breach of fiduciary duty, trespass and identity theft. Mr. Stanly filed a cross-complaint, of course. Recently, in a second case, Mr. Stanly was successful in obtaining a judgment against me for approximately \$50,000 relating to a guarantee both had made to Union Bank of a Prism loan. Recently, in a third case, Mr. Stanly has sued my wife claiming that she "removed property" causing \$2,000 in storage costs. It requests \$2,000 in damages and "compensatory" and punitive damages of "more than \$10,000 up to \$25,000." She has had to retain counsel to defend herself.

3. This involuntary chapter 7 petition is simply an extension of the litigation and a new strategy by Mr. Stanly to cause me and my family as much business and personal pain as possible. On August 11, 2005, I learned that two of my credit cards have been cancelled because the issuer thinks that I filed this bankruptcy myself. The long term costs in terms of increased interest on loans are obvious.

4. Mr. Stanly conducted a debtor's examination of me in Florida on May 9, 2005. The examination transcript covers 65 pages of my testimony. I was asked at length about my creditors and the numbers and total amount owed. My Answer filed in this case specifically identified 22 creditors. The list is attached hereto as Exhibit A.

5. I am ready for trial on this issue at any time. My 22 creditors are not contingent, or subject of a bona fide dispute (except Mr. Stanly whose judgment is being appealed). None of the 22 are employees or insiders. None of these creditors received a payment which was outside of the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this \_\_\_\_\_ day of November, 2005 at Destin, FL.

NEXT PAGE  
Francis J. Lopez

1 5. I am ready for trial on this issue at any time. My 22 creditors are not  
2 contingent, or subject of a bona fide dispute (except Mr. Stanley whose judgment is being  
3 appealed). None of the 22 are employees or insiders. None of these creditors received a  
4 payment which was outside of the ordinary course of business.  
5

6 I declare under penalty of perjury under the laws of the United States of America  
7 that the foregoing is true and correct to the best of my knowledge and belief.  
8

9 Executed this 17<sup>th</sup> day of November, 2005 at Destin, FL.

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11 Francis J. Lopez  
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FRANCIS LOPEZ  
EXHIBIT A  
LIST OF CREDITORS

Progressive Insurance  
PO Box 31260  
Tampa, FL 33631  
Acct. 37287380-4  
\$157.20  
Insurance, Auto

Coastal Community Insurance  
12139 Panama City Beach Pkwy.  
Panama City Beach, FL 32407  
Policy No. LHQ336763  
\$1,013.00  
Insurance, Flood (Property)

Quicken Platinum Card  
PO Box 44167  
Jacksonville, FL 32231  
\$848.00  
Goods and services, 1998- 2005

Okaloosa Gas District  
PO Box 548  
Valparaiso, FL 32580  
\$45.00  
Utilities

Northwest Florida Daily News  
200 Racetrack Rd.  
Ft. Walton Beach, FL 32549  
\$45.00  
Newspaper

Kelly Plantation Owners Association  
4393 Commons Drive E.  
Destin, FL 32541  
\$550.00  
Homeowner's Association

Allstate Floridian  
54 Beal Parkway  
Ft. Walton Beach, FL 32548  
\$1900.00  
Homeowners Insurance

EXHIBIT A

Texaco / Shell  
PO Box 9151  
Des Moines, IA 50368  
Acct. No. 77-917-6550-1  
\$290.00  
Gasoline and related

Bank Of America  
PO Box 1390  
Norfolk, VA 23501  
Acct. No. 4050860512429141  
Credit Card, goods and services  
\$2386.00

Verizon Wireless  
PO Box 660108  
Dallas, TX 75266  
Acct. No. 81955380600001  
\$45.00  
Utility – telephone

Cox Communications  
PO Box 60970  
New Orleans, LA  
Acct. No. 0018710003886502  
Utility – television and Internet  
\$112.00

Union Bank of California  
8155 Mercury Ct.  
San Diego, CA 92111  
Settlement of Union Bank v. Francis Lopez, \$15,000 original balance  
\$4,000.00

Bankcard Services  
PO Box 15287  
Wilmington, DE 19886  
Acct. No. 5490999178488929  
\$10,000.00  
Goods and services – 2001- 2005

Cingular Wireless  
PO Box 8229  
Aurora, IL 60572  
Acct. No. 0050443578  
\$125.00  
Utilities – telephone

EXHIBIT A

Wayne Wise  
810 Red Tanager Ct.  
Nashville, TN 37221  
\$15,000.00  
Personal Loan

Valley Forge Life Insurance  
100 CNA Drive  
Nashville, TN 37214  
Acct. No. VITU045825  
\$0.00 (\$486.00 per year)  
Life Insurance

American Home Shield  
PO Box 849  
Carroll, IA 51401  
Acct. No. 58449061  
\$128.00  
Home appliance insurance

Citi Cards  
PO Box 6414  
The Lakes, NV 88901  
Acct. No. 5424180306665024  
\$32,515.00  
Goods and Services, 1994 - 2005

Household Bank / HSBC  
PO Box 5222  
Carol Stream, IL 60197  
Acct. No. 5176690006732635  
Goods and Services, 2003 - 2005  
\$5,000.00

American Express  
PO Box 297804  
Ft. Lauderdale, FL 33329  
Acct. No. 378349802283007  
\$22,000.00  
Goods and Services, 1994 - 2004  
Note: Some of this debt may be owed by Prism and/or Stanly, though I have personal  
guarantee

Ft. Walton Beach Medical Center  
1000 Mar Walt Drive  
Ft. Walton Beach, FL 32547  
\$1600.00  
Medical and Health services  
Making payments of \$100.00 month

Alan Stanly  
1569 Berkshire Ct.  
San Marcos, CA 92069  
\$50,000.00  
Judgment in Union Bank v. Stanly (cross-complaint by Stanly)  
Currently under appeal in CA

PROOF OF SERVICE

I, MJ Hayes, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 21800 Oxnard St., Suite 840, Woodland Hills, CA 91367. On November 18, 2005, I served the within documents:

**MOTION BY ALLEGED DEBTOR FOR AN ORDER BIFURCATING TRIAL RE INVOLUNTARY PETITION; SETTING A DEADLINE TO ADD NEW PETITIONING CREDITORS; AND REQUIRING THE POSTING OF A BOND; DECLARATION OF FRANCIS J. LOPEZ**

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

X by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

.. by causing personal delivery by \_\_\_\_\_ of the document(s) listed above to the person(s) at the address(es) set forth below.

.. by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a \_\_\_\_\_ agent for delivery

.. by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

L. Scott Keehn  
Robbins & Keehn, APC  
530 "B" Street, Ste 2400  
San Diego, CA 92101

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 18, 2005, at Los Angeles, California.

  
\_\_\_\_\_  
MJ Hayes